STATE OF MICHIGAN

IN THE SUPREME COURT

MENARD, INC.,

Petitioner/Appellant,

v

CITY OF ESCANABA,

Respondent/Appellee.

Supreme Court No. 154062

COA Docket No. 325718

Michigan Tax Tribunal
Docket Nos. 441600 and
14-001918 (Consolidated)

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RESPONDENT/APPELLEE CITY OF ESCANABA'S
ANSWER TO APPLICATION FOR LEAVE TO APPEAL

Date: August 18, 2016

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

NATURE OF ORDER ON APPEAL

This is a property tax valuation appeal in which Petitioner/Appellant Menard, Inc. ("Menard") seeks to reduce its property tax liability by comparing the subject property, a big-box store that is not subject to any deed restrictions, to converted big-box stores, which are encumbered by anti-competitive deed restrictions that prohibit retail store use.

Menard filed an Application for Leave to Appeal to this Court from the May 26, 2016 published *per curiam* opinion of the Court of Appeals (Talbot, CJ, and Hoekstra and Shapiro, JJ) **(Exhibit A).** The Court of Appeals reversed the Michigan Tax Tribunal's decision in favor of Menard and remanded the case to the Tribunal for the taking of additional evidence. Specifically, the Court of Appeals reached the following conclusion and issued the following instructions to the Tribunal on remand:

> **The tribunal committed an error of law requiring reversal when it rejected the cost-less-depreciation approach and adopted a sales-comparison approach that failed to fully account for the effect on the market of the deed restrictions in those comparables.** Given this error, and the fact that there is little if any evidence in the record as to the impact of the deed restrictions on the comparables, we conclude that it is inadequate to simply remand to the tribunal for a new determination as to value. Instead, **on remand, the tribunal shall take additional evidence with regard to the market effect of the deed restrictions.** If the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's [highest and best use], then the comparables should not be used. **The tribunal shall also allow the parties to submit additional evidence as to the cost-less-depreciation approach.** After allowing the parties the opportunity to present additional testimony in light of the deficiencies identified in this opinion, the tribunal shall make an independent determination of the property's [true cash value] using correct legal principles.

(*COA Op*, p. 12, emphasis added.) The remand proceedings have not yet occurred because of the filing of Menard's Application.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The taxpayer, a "big box" retail store, argued in the Michigan Tax Tribunal that the true cash value of its property should be based on the sales comparison approach. The Tribunal accepted the sales comparison approach and rejected the local unit's use of the cost-less-depreciation approach, even though the purportedly "comparable" properties were encumbered by anti-competitive deed restrictions that limited prospective purchasers' ability to use the properties for their highest and best uses, and even though no adjustment was made in the taxpayer's appraisal to account for the deed restrictions. As a result, the true cash value of the property was slashed by more than $4 million, resulting in a substantial tax refund to the big box store.

The Court of Appeals reversed the Tribunal's decision, holding that there was not competent, material, and substantial evidence to support the Tribunal's conclusion that the deed restrictions did not impact the value of the comparable properties, and that the Tribunal erred by not considering the cost-less-appreciation approach. The Court of Appeals remanded the case for additional fact-finding as to the impact of the deed restrictions on value.

I. Should leave to appeal be denied because the Court of Appeals correctly held that the Tribunal's decision was based on an error of law and was not supported by competent, material, and substantial evidence on the whole record?

Appellant, Menard, answers: No.
Appellee, City of Escanaba, answers: Yes.

II. Should leave to appeal be denied because the Court of Appeals appropriately limited its review of the Tribunal's decision in accordance with Article 6, § 28 of the Michigan Constitution?

Appellant, Menard, answers: No.
Appellee, City of Escanaba, answers: Yes.

III. Should leave to appeal be denied because the Court of Appeals' decision will not impact other industrial or commercial properties, and because the legal issue in dispute will likely be resolved by legislation set to be considered later this year?

Appellant, Menard, answers: No.
Appellee, City of Escanaba, answers: Yes

INTRODUCTION & SUMMARY OF ARGUMENT

This case arises out of Appellant Menard, Inc.'s ("Menard") attempts to artificially reduce its property tax liability using the controversial and highly criticized "dark store" valuation theory. The Court of Appeals correctly rejected Menard's approach because it was unsupported by the evidence and remanded the case for additional fact-finding. The remand proceedings have not yet begun. Meanwhile, the Michigan Legislature is set to legislatively address the "dark store" theory later this year. Because the case has been remanded for additional fact-finding, and in light of the imminent legislation that will likely resolve the legal issue in dispute, leave to appeal should be denied.

The "Dark Store" Theory

Under the "dark store" theory of property valuation, big-box retailers like Menard file property tax appeals (often for newly constructed stores) and rely on the sales comparison approach in their appraisals. But because big box retailers operate under anti-competitive business models to limit competing retailers from buying their properties, the market for successful big-box stores is limited (*i.e.*, no one sells an operational Menard store). The retailers therefore cite to "comparables" that are not truly comparable at all. Their appraisals rely on vacant, failed stores ("dark" stores), and – as in this case – former big-box store properties that are encumbered with anti-competitive deed restrictions, which prohibit the property from being used for its highest and best use.[1] Instead, the so-called "comparable" sales often involve former stores sold for industrial or other non-retail uses, at deflated prices. The result is an artificially low valuation and, if the appeal succeeds, a windfall for the retailer.

[1] *See* B. Hamilton, "The 'Dark Store' Loophole", *State Tax Notes*, August 1, 2016, pp 349-353 **(Exhibit B)**. See also, R. Haglund "Gaming the System: Dark Stores," *The Review*, September/October 2015, pp 38-39; Chastity Pratt Dawsey, "Lawmakers Seek a Halt to 'Dark Stores' Tax-Cutting Strategy, *Bridge Magazine,* August 11, 2015.

Menard's Appeal

Like other big-box stores across the nation, Menard appealed the tax assessments levied by Appellee, the City of Escanaba ("City"). Menard's appraisal relied on "comparable" properties that were subject to deed restrictions, such that they could not be used for competing retail purposes – which was their highest and best use, and which is also the highest and best use of Menard's property. The Tribunal accepted Menard's appraisal and rejected the City's cost-less-depreciation approach to valuation, thereby reducing the true cash value of Menard's property by more than $4 million and awarding Menard a tremendous tax refund.

The City appealed, and the Court of Appeals reversed and remanded the case to the Tribunal for additional fact-finding. In its published opinion, the Court of Appeals held that the Tribunal's finding that the anti-competitive deed restrictions did not affect the comparable properties' value was not supported by competent, material, and substantial evidence, and that the Tribunal applied a wrong legal principle when it relied on the sales comparison approach and rejected the City's cost-less-depreciation approach. The Court of Appeals reasoned as follows:

> "[T]he Tribunal did not value the subject property at its HBU [highest and best use], an owner-occupied freestanding retail building, but instead valued it as a former owner-occupied free-standing retail building that could no longer be used for its HBU and could best be used for redevelopment for a different use."

The Court of Appeals remanded the case for the taking of additional evidence as to the market effect of the deed restrictions, with an instruction that if such evidence is insufficient, then the "comparable" properties should not be used. The Court of Appeals further ordered that additional evidence should be taken with regard to the cost-less-depreciation approach. Thus, *a final, appealable valuation of the subject property has not yet occurred.*

Grounds for Denying Leave to Appeal

Granting leave to appeal would be imprudent for at least three reasons. First, the Court of Appeals' decision was correct on the merits. The Tribunal failed to value Menard's property at its highest and best use because it relied on comparable properties with anti-competitive deed restrictions, which were not sold for their highest and best uses. Upon reviewing the whole record, the Court of Appeals found that the Tribunal's decision was not supported by competent, material, and substantial evidence because there was no evidence of how the deed restrictions impacted the market value of the comparable properties (and, consequently, the true cash value of the subject property). The Court of Appeals remanded for additional fact finding as to the impact of the deed restrictions on the market and for the taking of evidence on the cost-less-depreciation approach, which the Tribunal had rejected outright. Review by this Court prior to the remand proceedings would be premature.

Second, contrary to Menard's claims, the Court of Appeals did not exceed the proper scope of appellate review or make improper "weight and credibility" determinations. Although Menard tries to bind the Court of Appeals to the Tribunal's characterization of the testimony, the Court of Appeals was required to – and did in fact – review the *whole* record, and found that the Tribunal's factual findings were not supported. Menard has not shown any "clear error" that results in "material injustice" that would warrant granting leave to appeal.

Finally, this case will not have a "devastating" impact on all property tax valuation cases, as Menard alleges. The Court of Appeals did not ultimately determine the value of the property; rather, the Court found insufficient evidence to answer that question and remanded the case. Moreover, the deed restrictions at the center of this appeal are unique to big-box stores, and

Menard offered no evidence that the same valuation issue would arise in other commercial or industrial appeals.

Menard claims that this is a "much watched case." (*App Lv*, 1.) Certainly, the "dark stores" issue itself has been closely watched. But this particular case has minimal impact because the Court of Appeals did not make a valuation determination or outright reject any single valuation approach, nor does the Court of Appeals' decision change the definition of "true cash value" or "market value." The Court of Appeals' opinion will therefore not have the "sweeping" effect that Menard forecasts.

In any event, the Michigan House of Representatives recently passed a bill that would legislatively resolve the legal issues in this case, and the bill will be discussed in the Senate this fall. Given the pendency of the bill that is colloquially known as the "dark stores" legislation, review of the same issue by this Court may ultimately prove unnecessary.

For these reasons, the City requests that this Court deny Menard's Application for Leave to Appeal.

STATEMENT OF FACTS

I. The Subject Property

In April 2008, Menard purchased an 18-acre site on the City's commercial corridor along highway US 41, near the cinemas and mall, for $1,150,000 and constructed a brand new 185,666 square foot store with a garden center. *Respondent's Valuation Disclosure,* R-9[2], pp 10-11, 24, 37. In addition to parking and overhead lighting, the Property has covered shipping docks and a separate 21,245-square-foot warehouse. R-9, pp 40-44; *Petitioner's Valuation Disclosure,* P-1, p 28. In 2009, Menard moved from a 59,872-square-foot leased space in the City to its newly-constructed store. R-9, p 10. As of December 31, 2011 (the valuation date for the first year on appeal[3]), Menard owned the Property free of any deed restrictions, restrictive covenants, or other encumbrances upon its use. See P-1, pp i, 5.

II. Petitioner's Valuation of the Property

At the August 14, 2014 Tribunal hearing, Menard presented one exhibit in support of its case: a valuation disclosure dated February 25, 2013 ("Valuation") prepared by Joseph Torzewski ("Torzewski" or "Menard's appraiser"). P-1. Torzewski testified that the Property is a "big box," relying on the definition in *The Dictionary of Real Estate Appraisal* (5th ed). *Hearing Transcript*, p 20.[4] Torzewski defined a "big box" as a retail store between 10,000 and 100,000 square feet. *HT*, p 20. According to Torzewski, these types of stores were normally

[2] Record references correspond to the Court of Appeals record and are not attached to this Answer. R-# refers to Respondent's hearing exhibits and P-# refers to Petitioner's hearing exhibits (using the same numbering as the Tribunal record).

[3] "The taxable status of persons and real and personal property for a tax year shall be determined as of each December 31 of the immediately preceding year, which is considered the tax day." MCL 211.2(2).

[4] The Hearing Transcript for the August 14, 2014 hearing will be cited as "HT." It is part of the Court of Appeals record but is not attached to this Answer.

built by national retailers, "like a Target, a Home Depot, Circuit City." *HT*, pp 74-75. Torzewski testified about his opinion of big box stores, generally, throughout Michigan. *HT*, pp 26-27, 60. To him, "[i]t's a big-box building. It's an open construction, large ceiling or high ceilings. You know, it's essentially a warehouse building." *HT*, p 20.

Torzewski determined the highest and best use of the Property as improved was "for continued use of the existing improvements as a free-standing retail building use." P-1, p 34. Torzewski reasoned further that "no alternative use would financially support demolition of the improvements and redevelopment of the site" because the store was a "recent build," and there was no "different use." P-1, p 33; *HT*, p 36.

Torzewski rejected the cost approach to valuation because he believed that in the case of "big box" stores, functional obsolescence is built into them and they are subject to external obsolescence, both of which he said affect the value but which are difficult to analyze properly. *HT*, p 60. According to Torzewski, "[f]or the most part buyers of these properties just don't utilize the cost approach when they're looking to buy a property." *HT*, p 60. See also P-1, p 6. Torzewski did not provide supporting analysis or research as to why he believed the replacement cost approach was inappropriate.

Instead, Torzewski used the sales comparison approach to appraise the Property. His Valuation began with a "Market Analysis" that discussed the "Metropolitan Detroit Big Box Retail Market," despite the subject property's location in the Upper Peninsula. P-1, p 20. He then evaluated "first generation build-to-suit properties," and "leased, second generation space." Both were leased-fee sales. P-1, p 20. The Valuation compared the two and concluded the second generation leased space sold for less. The Valuation also discussed fee simple

transactions at the hearing but provided no descriptions of the property or the conditions of the transactions. *HT*, 32-33.

Importantly, the "Market Analysis" included what Menard's appraiser considered to be eight comparable sales. P-1, p 37. The sales comparables used by Menard's appraiser were:

> **Comparable Sale No. 1**: This property was a former Home Depot that had been vacant since 2011 and had sold twice within a six month time period. The appraiser noted in his Valuation and also at the hearing that the property was sold with a deed restriction. P-1, pp 41, 84-85; *HT*, 40. The deed restriction may have had an effect on the earlier sale. *HT*, 92. Torzewski was unable to verify whether any elimination or reduction of the deed restrictions were recorded. *HT*, 91-92. Torzewski adjusted for local and building size but made not adjustment for the deed restriction. P-1, pp 41, 84-85
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> **Comparable Sale No. 2**: The property was built in 1989 as a small strip mall. *HT*, 41. After the sale, it was retrofitted into a City Hall. P-1, p 88. The appraiser explained at the hearing that there were two sales, a foreclosure sale and second sale, but was unable to confirm whether the seller was a real estate investment and marketing entity working behalf of the bank. *HT*, 105-106. Torzewski adjusted for building size and location. P-1, pp 41, 87-88.
>
> **Comparable Sale No. 3**: The property was a factory. At the hearing, Torzewski admitted that the property was sold with a lease to Wal-Mart, with a deed restriction by Wal-Mart that limited the size of any grocery store or discount store. *HT*, 111-112. He was unable to say whether its use as a factory was the result of the deed restriction but determined the deed restriction had no impact and did not note the restriction in his Valuation. *HT*, 111-112. The appraiser adjusted for location and condition of the property. P-1, pp 41, 92-93.
>
> **Comparable Sale No. 4**: The property was built in the 1980s and was used as office and as a factory. *HT*, 42. The appraiser adjusted for location and condition of the property. P-1, pp 41, 91-92.
>
> **Comparable Sale No. 5**: The property was built in the 1995 and was also used as a factory. *HT*, 42; P-1, pp 41, 93-94. The property was previously owned by Wal-Mart and was sold with deed restrictions. *HT*, 113. The appraiser adjusted for location. P-1, pp 41, 93-94.
>
> **Comparable Sale No. 6**: The property was built in the 1995 and was a furniture store. *HT*, 42; P-1, pp 41, 93-94. The property was previously owned by Wal-Mart and was sold with deed restrictions. *HT*, 113. The appraiser adjusted for location. P-1, pp 41, 93-94.

Comparable Sale No. 7: The property was a former Kroger store that was to be used as rental property. *HT,* 43; P-1, pp 41, 97-98. It was sold without a deed restriction. *HT,* 114.

Comparable Sale No. 8: The property was intended to be a multi-tenant (2-5 tenants) strip mall. *HT,* 43; P-1, pp 41, 99-100. Wal-Mart sold the property with deed restrictions. *HT,* 163. The appraiser adjusted for location and building size. P-1, pp 41.

On cross-examination, Menard's appraiser admitted that five of the eight sales involved deed restricted property. *HT,* p 87, 95, 108,113. For example, all of the Walmart properties (Nos, 3, 5, 6, and 8) were offered for sale with following deed restriction:

> This conveyance is expressly subject to the following conditions and restrictions:
>
> The Property will not be used for or in support of the following: (i) grocery store or supermarket, as hereinafter defined below; (ii) a wholesale club operation similar to that of a Sam's Club owned and operated by Wal-Mart; (iii) a discount department store or other discount store, as hereinafter defined (iv) a pharmacy; or (v) gaming activities (including but not limited to gambling, electronic gaming machines, slot machines and other devices similar to the aforementioned), billiard parlor, any place of recreation/amusement, or any business whose principal revenues are from the sale of alcoholic beverages for on or off premises consumption (the "Property Restrictions). "Grocery store" and "supermarket" as those terms are used herein, shall mean a food store or a food department containing more than thirty-five thousand (35,000) square feet of gross leasable area, for the purpose of selling food for consumption off premises, which shall include but not be limited to the sale of dry, refrigerated or frozen groceries, meat, seafood, poultry, produce, delicatessen or bakery products, refrigerated or frozen dairy products, or any grocery products normally sold in such stores or departments. "Discount department store" and/or "discount store", as those terms are used herein, shall mean a discount department store or discount store containing more than fifty thousand (50,000) square feet of gross leasable area, for the purpose of selling a full line of hard goods and soft goods (e.g. closing, cards, gifts, electronics, garden supplies, furniture, lawnmowers, toys, health and beauty aids, hardware items, bath accessories and auto accessories) at a discount in a retail operation similar to that of Wal-Mart. Nothwithstanding the foregoing, the Property Restrictions shall not apply to Wal-Mart Stores, Inc., or any parent company, affiliate, subsidiary, or related company.
>
> * * *
>
> The Property Restrictions shall remain in effect for a period of twenty-five (25) years. … The aforesaid covenants, conditions, and restrictions shall run with and bind the Property, and shall bind Grantee or an affiliated entity, or its successors or assigns, and shall inure to the benefit of and be enforceable by Grantor, or an

> affiliated entity, or its successors and assigns, by any appropriate proceedings at law or in equity to prevent violations of such covenants, conditions, and restrictions and/or to recover damages for such violations, including without limitation damages incurred by Grantor, or an affiliated entity, concerning the business conducted on the land adjacent to the Property. [R-3, p 3.]

Menard's appraiser acknowledged that the fee simple includes the "full bundle of rights" inherent in real property ownership but that the existence of deed restrictions on a property removes some of the sticks in that bundle of rights. P-1, p I, 39; *HT*, pp 30, 59-60, 86. However, in his opinion, "the restrictions that were in place aren't anything really out of the ordinary or would affect the secondary user of the property." *HT*, pp 47-48. Torzewski made no adjustments for the difference in property rights involved in the "comparable" sales that he selected and disregarded the deed restrictions because he was told that the restrictions did not have any effect on the sale price. P-1, p 39; *HT*, pp 65, 90. With the exception of the first sale comparable listed in his Valuation, he did not note, let alone analyze, the deed restrictive or forced nature of the sales that he used in reaching his conclusion of value. P-1, pp 41, 84-100.

In sum, of the eight sales comparables used by Menard's appraiser, five had deed restrictions and two were the subjects of forced sales. Consistent with the deed restrictions, the sales consisted of three factories, two strip malls, a city hall, and an investment property. Only two—Improved Sale 6 and Improved Sale 7—were sold without deed restrictions and were not forced sales, which resulted in a substantially higher price per square foot among the eight properties used. Five of the eight comparables were located in the Detroit metropolitan area, a location Menard's appraiser acknowledged had many vacant commercial properties that "could have an affect [sic] on sales prices.". P-1, p 19; *HT*, p 79.

III. Respondent's Valuation of the Property

The City introduced nine exhibits at the August 2014 hearing. Exhibits 1 through 8 consisted of deed and use restrictions related to the properties used as sales comparables in Menard's Valuation. See R-1 through R-8. The City's valuation disclosure is found at R-9.

City Assessor Daina Norden, MAAO and personal property examiner, *HT*, pp 127-129, testified at the hearing that the City utilized two methods of valuation: the cost approach and the sales comparison approach. See R-9, pp 51-52. As Assessor Norden explained, the City used the cost approach and then verified the cost approach by reviewing sales in the market area. *HT*, p 134.

In preparing a cost-less-depreciation value, Assessor Norden explained that she determined separate values for the land and for public service improvements (parking lot, lighting, water and sewer). *HT*, 145, 148-149, 152. She added these values to the replacement cost of the buildings, which she calculated by using a cost price per square foot but also considered various aspects of the buildings such as the type of construction, ceiling height and heating systems. *HT*, 146-148, 150. From the replacement cost, she deducted depreciation for the age of the buildings. *HT*, 146, 149. She provided a copy of the property record card showing her calculations and photographs of the property in her Valuation. R-9, pp. 36-44.

Given the City's unique geographical location in Michigan's Upper Peninsula, and the fact that there were no comparable sales in the Upper Peninsula, Assessor Norden considered the closest comparable sales from adjacent Wisconsin. *HT*, p 134; R-9, p 34-48. She reviewed completed sales and consulted with local assessors. She also used a database to review broker listings, including properties with a current lease about to expire. *HT* 154. She excluded properties with use restrictions because she believed they affected the value and were not comparable to the Property. *HT*, pp 152-53, 155; R-9, p 48. The Assessor summarized the eight sales and three listings that she believed most relevant in the City's Valuation. R-9**,** p 46-50.

Although she did not use the sales comparison approach as a primary method of value, the ranges of a sales and broker listing provided a "validation" of Norden's concluded construction cost value. *HT* 154. She confirmed on cross examination that the sales—both the small number of them in Wisconsin and Upper Peninsula, and the quality of the sales—were insufficient to develop a standalone sales comparison valuation. *HT*, 177.

The City also presented testimony of Miles Anderson, an assessor and a certified general appraiser. Anderson conducted a limited appraisal review of Menard's Valuation. *HT*, p 206. Anderson disputed Menard's definition of a "big-box store." *Id.* He testified that an appraisal of the type presented by Menard's would typically include notation and discussion of any use restrictions, and that Menard's appraiser failed to include those items in his report. *HT*, pp 210, 212.

IV. The Tribunal's Opinion and Judgment

In its Final Opinion and Judgment, the Tribunal determined that the state tax commission method of determining value was invalid for use in valuing single properties. *FOJ*, p 13. The Tribunal also rejected the use of the cost approach. *Id.* It did not dispute the replacement cost, land values or the method of calculating depreciation but found the cost approach invalid because it had failed to account for "functional obsolescence" from the costs required to renovate the property for other uses. *Id.* The Tribunal also rejected the City's sales comparison analysis, concluding that the City's listings and sale comparables "amount to raw, unadjusted, unapplied data relative to the subject property." *Id.*

The Tribunal essentially adopted Menard's Valuation, concluding that "Petitioner has convincingly articulated that 1st generation users develop big box retail space to enhance retail sales and not to optimize market value to the property." *FOJ*, p 13. The Tribunal found Torzewski's testimony regarding consideration of the deed restrictions "meaningful" to "his overall analysis." *Id.* at 16.

The City moved for reconsideration, alleging several errors in the Tribunal's decision. On November 24, 2014, the Tribunal issued a Corrected Final Opinion and Judgment, correcting a clerical error in the taxable value recited in the Final Opinion and Judgment. The Tribunal dismissed the City's other arguments regarding the flaws in Menard's Valuation and the Tribunal's analysis under the sales comparison approach. In doing so, the Tribunal made *no* finding as to whether Improved Sales 2 or 4 were "forced sales" as defined in MCL 211.27(1). The Tribunal tersely acknowledged that Menard's Improved Sale 4 was a foreclosure sale and that many of the properties were subject to deed restrictions. See *CFOJ*, p 3. However, the Tribunal found that the deed restrictions and sales conditions did not impact the determination of value for the Property. Citing *Lochmoor Club v City of Grosse Pointe Woods*, 10 Mich App 394, 398; 159 NW2d 756 (1968), the Tribunal reasoned:

> Although deed restrictions can affect a property's market value and therefore must be considered . . . Mr. Torzewski, did take such factor into consideration in developing his sales comparison analysis and determined that the deed restrictions, on those properties that he *utilized*, had no effect on the properties' sales prices, and the Tribunal found this testimony, and analysis regarding the same, to be credible. . . . As a result, no adjustment for these sales comparables, absent any credible evidence to the contrary, was necessary. [*CFOJ*, p 2.]

The Tribunal found that deed restricted sales were "still fee simple transactions" in which the grantees obtained full ownership rights in the property. *CFOJ*, p 3.

V. Court of Appeals Opinion

The Court of Appeals reversed the Tribunal's decision and remanded the matter for additional factual findings. (*COA Op*, Exhibit A.) The Court of Appeals concluded that the Tribunal's reliance on the sales comparison approach was based on an error of law and was not supported by competent, material, and substantial evidence. *COA Op*, 7.

The Court began its analysis by noting that it is an error of law to fail to consider deed restrictions when establishing assessments, based on *Kensington Hills Dev v Milford*, 10 Mich

App 368; 159 NW2d 330 (1967), and *Lochmoor*, 10 Mich App at 394. Although Menard's appraiser claimed that he considered the deed restrictions, the Court of Appeals found that "the record is insufficient to support his assertion that they had no effect on the sales price for the restricted comparables." *COA Op*, 7. Menard's appraiser only consulted the parties involved in the comparable sales. As a result, "the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple." *Id.* at p. 8.

The Court emphasized that property must be assessed based on its highest and best use ("HBU"), and "[d]eed restrictions that limit the ability of prospective buyers to use the comparable properties for the subject property's HBU necessarily limit, if not eliminate, the willingness of those buyers to purchase the restricted property." *Id.* The Court further reasoned as follows:

> Those who would be interested in buying the property with restrictions would need to make modifications to convert the building from retail to something else, like industrial use. Given the need to convert, the buyers would necessarily pay a lower price.
>
> For the same reasons, the anti-competitive nature of the deed restrictions means that the deed-restricted comparables could not be sold for their HBU. The potential buyers of the comparables were therefore limited to buyers willing to accept the use restrictions. Further, because of the prevalence of the self-imposed deed restrictions on big-box stores, there is essentially no market for big-box stores being sold for the HBU of the subject property. Thus, half of Torzewski's comparables were not evaluated at the HBU of the subject property because the deed restrictions expressly prohibited their use as a freestanding retail center.

Id. The Court concluded that "on this record, there is no evidence to account for the impact of the deed-restricted properties being sold for purposes other than the HBU of the subject property." *Id.* Because the Tribunal did not value the property at its higher and best use – as an

owner-occupied freestanding retail building – but instead valued it as a *former* owner-occupied freestanding retail building that could *no longer be used* for its higher and best use – the Tribunal made an error of law. *Id.*

The Court of Appeals further held that the Tribunal erred by failing to consider the cost-less-depreciation approach. Given the lack of a market for big-box stores at the property's highest and best use (due to the anti-competitive practice of imposing deed restrictions), the cost-less-depreciation approach was appropriate, as a matter of law, to consider when valuing the property. In so holding, the Court reasoned that "it would not be appropriate to value the subject property significantly less than its replacement costs simply because owner-occupied freestanding retail spaces are rarely bought or sold for use as owner-occupied freestanding retail spaces on the open market." *Id.* at 10.

The Court of Appeals also found that the Tribunal erred by rejecting the cost-less-depreciation approach based on the City's alleged failure to adjust for functional obsolescence. The Court held that "[t]here was no evidence in the record of any deficiency in the subject premises that would inhibit its ability to properly function as an owner-occupied freestanding retail building." *Id.* at 11. The Court therefore remanded the case as follows:

> [O]n remand, the tribunal shall take additional evidence with regard to the market effect of the deed restrictions. If the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's HBU, then the comparables should not be used. The tribunal shall also allow the parties to submit additional evidence as to the cost-less-depreciation approach.8 After allowing the parties the opportunity to present additional testimony in light of the deficiencies identified in this opinion, the tribunal shall make an independent determination of the property's TCV using correct legal principles.

Id. at 12. Thereafter, and prior to any Tribunal proceedings on remand or additional fact-finding, Menard filed its Application for Leave to Appeal to this Court.

ARGUMENT

I. Leave to appeal should be denied because the Court of Appeals correctly held that the Tribunal's decision constituted an error of law and was not supported by competent, material, and substantial evidence on the whole record.

The Court of Appeals appropriately focused much of its discussion on the anti-competitive deed restrictions that encumbered the "comparable" properties used in Menard's sales comparison approach, which the Tribunal adopted. The Court of Appeals concluded that the Tribunal failed to value the subject at its highest and best use (as an owner-occupied, freestanding retail building), but instead valued it as a *former* owner-occupied, freestanding retail building that could *no longer be used for its highest and best use*. For the reasons set forth below, the Court of Appeals' decision is correct, and review by this Court is not warranted.

a. The Court of Appeals correctly held that the deed restrictions limited prospective buyers' ability to use the "comparable" properties for their highest and best use and that, therefore, the Tribunal erred by relying on the sales comparison approach.

The Court of Appeals' decision was largely based on the Tribunal's failure to account for the impact of the deed restrictions on the market value of the comparable properties, given that the restrictions prevented the properties from being sold for their highest and best use – as an owner-occupied, freestanding, retail building suitable as a "big box" store. Depending on the additional evidence presented on remand, the most reliable valuation method may be the cost-less-depreciation approach, rather than the sales comparison approach. As explained below, the "highest and best use" of the property plays an important role in determining which valuation method to use in a particular appeal and in ensuring that assessments are uniform among similar properties.

i. Determining the correct valuation approach is essential to ensuring uniformity in taxation.

The Michigan Constitution requires the Legislature to provide a method for uniformly assessing property based on its "true cash value." Const 1963, art 9, § 3; *Cleveland-Cliffs Iron Co v Republic Twp*, 196 Mich 189, 199; 163 NW 90 (1917). For this purpose, the Legislature has defined "true cash value" to mean "the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale…or at forced sale." MCL 211.27(1).[5]

Courts are left to approve the specific method of determining "true cash value" that "make[s] it possible to achieve uniformity" in property tax assessments. *Antisdale v City of Galesburg*, 420 Mich 265, 276; 362 NW2d 632 (1985); *Washtenaw Co v State Tax Comm*, 422 Mich 346, 363; 373 NW2d 697 (1985). Although the analysis of "fair market value" may assist in determining "true cash value" (and in some instances, "fair market value" equates to "true cash value"), the definition of "fair market value is not conclusively determinative of 'true cash value'" or its underlying constitutional purpose of providing a standard for uniform assessments. *Allied Supermarkets Inc v State Tax Comm*, 381 Mich 693, 704; 167 NW2d 264 (1969); *Cleveland-Cliffs*, *supra.*[6]

Michigan courts have accepted and required the use of three general approaches to valuation: the capitalization-of-income approach, the sales comparison approach, and the cost-

[5] Since the enactment of the General Property Tax Act ("GPTA") in 1893, the definition of "true cash value" contained in MCL 211.27 has essentially remained unchanged. The definition of true cash value in MCL 211.27 precedes by over 80 years the concept of "fair market value." *Cleveland-Cliffs*, *supra.* See also *United States v Cartwright*, 411 US 546 (1973).

[6] This Court illustrated this concept in *Meadowlanes*, 437 Mich at 493, noting:

> We find further evidence that [the] valuation approach is flawed because it derives a value for ad valorem tax purposes that fails to parallel a likely valuation estimate derived for other purposes, i.e. a sales price, financing, insurance, calculating new worth in a financial statement, or federal income tax purposes.

less-depreciation approach. *Fisher-New Ctr Co v State Tax Comm*, 380 Mich 340, 362-63; 157 NW2d 271 (1968).[7] "[W]ith all approaches available for use and comparison of results, valuations of property for assessment purposes are more likely to reflect true cash values than will be the case if only a single mode is used." *Fisher-New Ctr Co*, 380 Mich at 369-70.

The methods used must avoid the risk of "creating irrational disparities in the true cash value of real property" that would "violat[e] the constitutional mandate of uniformity in the assessment of ad valorem taxes." *Meadowlanes Dividend Housing Ass'n v Holland*, 437 Mich 473, 494; 473 NW2d 636 (1991). For that reason, a valuation approach that is not the primary source for determining value can be properly used to provide a "check" on the primary method of valuation, as the use of all three approaches ensures that all relevant factors are evaluated:

> All three approaches should be used whenever possible, and an appraisal which disregards an approach by mere statements and without research justifying nonuse is considered incomplete. The values derived under the various approaches are correlated, reconciled, and weighed in order to reach a final estimate of value. The ultimate goal of the value process is a well-supported conclusion that reflects the study of all factors that influence the market value of the subject property. After arriving at a value estimate under each approach, the appraiser examines the various estimates of value. A wide spread may indicated that one or more of the approaches is not truly applicable. [*Meadowlanes*, 437 Mich at 485 n 24.]

All valuation approaches must exclude speculative data or methodology that is either "inadequate" or "reflective of a distorted market or would undermine the uniformity in the assessment of property taxes." *CAF Inv Co v State Tax Comm,* 392 Mich 442, 456; 221 NW2d 568 (1974); *Helmsley v City of Detroit*, 380 F2d 169, 171 (CA 6, 1967).

In this case, as the Court of Appeals noted, "[t]he parties agree that the highest and best use of the property is as an owner-occupied freestanding retail building. Their disagreement lies

[7] In addition to the three approaches to value, Michigan courts allow consideration of "any method," provided the method accurately and reliably determines and is reasonably related to a determination of "true cash value." *CAF Inv Co*, 392 Mich at 450 n 2.

in the *valuation methodologies to be employed* and the data relevant to the valuation." *COA Op*. 6-7. Menard argued for the sales comparison approach; the City relied on the cost-less-depreciation approach. As explained below, the City asserts – and the Court of Appeals agreed – that the sales comparison approach cannot be used if the comparable properties cannot be sold for the same "highest and best use" as the subject property.

ii. The sales comparison approach requires comparable properties that share the subject property's "highest and best use."

The sales comparison approach indicates true cash value by analyzing recent sales of similar properties, comparing them with the subject property, and adjusting the sales price of the comparable properties to reflect differences between the two properties. *Meadowlanes*, 437 Mich at 485 n 19. The highest and best use standard requires a determination of which properties are competitive with the subject property in the market, and it provides a basis by which obsolescence can be deducted to account for unique design or external factors.

Noticeably absent from the Application is any discussion of the standard appraisal principles and practices that underlie the sales comparison approach – namely, the importance of identifying and valuing the highest and best use of the property. No page, paragraph, or sentence in the Application disputes the Court of Appeals' six-page discussion of the Tribunal's failure to value the property at its highest and best use. (*COA Op*. 6-12). Instead of discussing the highest and best use issue, the Application casually asserts valuation claims without any reference to *The Appraisal of Real Estate, (14th ed.)*,[8] such as, for example, that the "Court of Appeals' Opinion upends the commonly accepted method of verifying sales of comparables," (*App Lv* 3), or,

[8] The Application cites to *The Appraisal of Real Estate* to argue that the statutory definition of "true cash value" contained in MCL 211.27(1) need not be used because, Menard asserts, the statutory definition has been replaced by the definition of "market value" from *The Appraisal of Real Estate*. *App Lv,* 1-2.

"[d]epreciation must be calculated and deducted from the cost calculation (value in use) to convert it to market value (value in exchange)," (*App Lv* 13), or, "obsolescence affects nearly all commercial properties," (*App Lv* 14), or that the Court of Appeals' decision is "contrary to the fundamental valuation principles" (*App Lv* 17).

In contrast to the "approach" used in the Application, the appraisal of real property first requires identification of the nature of the property and the rights that will be appraised. *The Appraisal of Real Estate, pp 34, 57-86.* This requires the appraiser to identify and value legal restrictions which create partial interests in the property. *The Appraisal of Real Estate, pp 74, 194-195.* The data analysis resulting in a valuation conclusion requires a market analysis and a highest and best use analysis. "Even the simplest valuation assignments" must be based the highest and best use of the real estate. *The Appraisal of Real Estate, p 41.*

Consistent with standard appraisal principles, this Court has recognized that an adequately supported determination of highest and best use provides the basis for selecting and adjusting comparable properties that match the subject property's highest and best use. *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 633-34; 462 NW2d 325 (1990); *see also Lochmoor Club*, 3 Mich App at 529-532. Thus, in a case such as this where a party relies on the sales comparison approach, the comparable properties must be capable of being sold for the same highest and best use as the subject property. As discussed below, the deed restrictions encumbering the comparable properties in this case resulted in the Tribunal failing to value the property at its highest and best use.

iii. Properties with anti-competitive deed restrictions are generally not sold for their highest and best use, and the Tribunal erred as a matter of law by failing to account for the deed restrictions.

The Court of Appeals emphasized the importance of the property's highest and best use in its decision:

> To determine true cash value, *the property must be assessed at its highest and best use.* The concept of highest and best use recognizes that the use to which a prospective buyer would put the property will influence the price that the buyer would be willing to pay for it. The concept is fundamental to the determination of true cash value. *COA Op*. 6 (emphasis in original).

Despite the importance of the property's highest and best use, Menard's appraisal relied on properties that could *not* be used for the same highest and best use of the subject property. Menard asserted that the subject property's highest and best use was its continued use as a free-standing retail building, without any conversion or remodeling to an alternative use. However, five of the eight "comparable" sales in Menard's appraisals involved properties in which future "big-box" retail use was prohibited by anti-completive deed restrictions. Consequently, none of those five comparable properties were sold for future retail use; rather, they were converted, as required by the deed restriction, to industrial or other non-retail uses.[9]

As a result, the Court of Appeals found that "the anti-competitive nature of the deed restriction means that the deed-restricted comparables ***could not be sold for their HBU***. The potential buyers of the comparables were therefore limited to buyers willing to accept the use restrictions" and use the property for a non-commercial purpose. *COA Op*, 8 (emphasis added). The Court of Appeals therefore held that the Tribunal failed to value the subject property (which was *not* encumbered by a deed restriction) at its highest and best use, which was an error of law:

> The tribunal did not value the subject property at its HBU, an owner-occupied freestanding retail building, but instead valued it as a former owner-occupied freestanding retail building that could no longer be used for its HBU and could best be used for

[9] The properties that were sold consisted of three factories, a city hall, a multi-tenant strip mall, a furniture store, a rental property, and property that was vacant since 2011 and for which no use was known or projected; two of these sales were foreclosures. None were unencumbered, owner-occupied, freestanding retail buildings. Menard Appraisal, pp 85-100.

> redevelopment for a different use. In doing so, the trial court made an error of law by failing to value the subject property at its HBU. *COA Op.* 8.

Importantly, although the Tribunal was aware of the deed restrictions, the Tribunal did not make any adjustments to account for the deed restrictions, even though the anti-competitive limits on the property would likely affect value, as the Court of Appeals recognized:

> Deed restrictions that limit the ability of prospective buyers to use the comparable properties for the subject property's HBU necessarily limit, if not eliminate, the willingness of those buyers to purchase the restricted property. **Those who would be interested in buying the property with restrictions would need to make modifications to convert the building from retail to something else, like industrial use. Given the need to convert, the buyers would necessarily pay a lower price.** *COA Op,* 8 (emphasis added).

Stated differently, the "comparable" sales were not truly comparable to an *owner occupied, free standing, retail building* used for "big box retail." Under well-established Michigan case law,[10] the comparable sales used in this case were impermissible as a matter of law. The Court of Appeals was therefore correct in holding that the Tribunal erred as a matter of law.

iv. The Tribunal's reliance on the sales comparison approach was not supported by competent, material, and substantial evidence on the whole record.

The Court of Appeals further concluded that the Tribunal's reliance on the sales comparison approach was not supported by competent, material, and substantial evidence on the whole record. Specifically, the Court of Appeals found that Menard's assertion that the deed restrictions had "no effect" on value was not supported by the record:

> Although Torzewski [Menard's appraiser] testified that he considered the deed restrictions, **the record is insufficient to support his assertion that they had no effect on the sales price for the restricted comparables.** His testimony is that he consulted

[10] *Edward Rose Bldg Co*, 436 Mich at 620; *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676; 840 NW2d 168 (2013).

> the brokers, sellers, and buyers of the comparables. Thus, **that testimony is only sufficient to establish that <u>to the parties involved in the actual transaction</u>, the deed restrictions did not affect the sales price they were willing to pay.** In other words, the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple.
>
> * * *
>
> **On this record, there is no evidence to account for the impact of the deed-restricted properties being sold for purposes other than the HBU of the subject property.** It is plain that no adjustments were taken for this major difference in the subject property and the restricted comparables. Accordingly, we conclude that the tribunal erred in finding Menard's sales-comparison approach meaningful to its determination of the subject property's TCV. *COA Op*, 7-8 (emphasis added).

The Court of Appeals' conclusion is correct. Menard offered no evidence of how the deed restrictions impacted the value of the comparable properties in the market (*i.e.*, beyond the professed impact on the actual buyers, who converted the buildings to other uses). For example, there was no evidence of how the deed restrictions would impact the market value in relation to purchasers who wish to engage in retail uses, which would be the highest and best use.

Indeed, the record establishes that two comparables that were not subject to anti-competitive deed restrictions had ***higher*** sale prices than the five comparables that were encumbered by deed restrictions.[11] This shows that contrary to Menard's claim, the deed restrictions did, in fact, have a detrimental impact on value, as one would logically expect.

Ultimately, however, the question of whether the comparables' value was impacted by the deed restrictions is not properly before this Court. The Court of Appeals remanded the case to the Tribunal for fact-finding on this specific issue. ("[O]n remand, the tribunal shall take

[11] See, P-1, Sale No. 6 and 7; see also R-6, and R-7. The price per square foot value of the two furniture stores was significantly higher than deed restricted properties.

additional evidence with regard to the market effect of the deed restrictions. If the data is insufficient to reliably adjust the value of the comparable properties if sold for the subject property's HBU, then the comparables should not be used." *COA Op*, 12.) There is no legal issue here that requires this Court's intervention. Accordingly, the City requests that the Application be denied.

b. The Court of Appeals did not adopt a "value in use" standard or expand *Clark.*

Even though "highest and best use" drove the Court of Appeals' decision, Menard does not discuss highest and best use in its Application. Instead, Menard alleges – incorrectly – that the Court of Appeals upended Michigan law by adopting a "value in use" theory and expanded the Court of Appeals' prior decision in *Clark Equipment Co v Leoni*, 113 Mich App 778; 318 NW2d 586 (1982). Neither argument has merit.

i. The cost approach is not synonymous with "value in use."

Menard insists that the Court of Appeals erred because it adopted a "value in use" theory, while Michigan is a "value in exchange" state. *App Lv*, 1. Menard's argument is based on its flawed understanding of the term "market value," which Menard equates solely with the sales comparison approach. Under Menard's reading, "true cash value" means "market value," and "market value" – at least for big box stores – can *only* be determined with the sales comparison approach. *App Lv* 2 ("[T]he proper inquiry is how much would a knowledgeable buyer pay, not how much Menard would pay to purchase or did pay to construct the property ..."). In Menard's view, any other valuation approach, including the cost approach, is a "value in use" theory that does not accurately determine market value. *See Ap Lv*, 17 (referring to the "cost valuation methodology (***i.e., value in use***)").

As a preliminary matter, Menard did not argue this "value in use" theory in the Tribunal or in the Court of Appeals, and thus the argument is not preserved for appeal. *Booth*

Newspapers, Inc v University of Mich Bd of Regents, 444 Mich 211, 234; 507 NW2d 422 (1993) (issue is not preserved for appellate review when it is raised for the first time on appeal).

Regardless, Menard's argument fails because it is based on an entirely false premise, which is that the cost approach is contrary to or inconsistent with "market value." Quite the opposite is true: **this Court has held that the cost approach *is* a comparative or market-data approach to value.** *Antisdale*, 420 Mich at 276 n 1 ("In reality the cost approach is another type of comparative or market data approach"). As the *Appraisal of Real Estate* notes,

> [b]uyers of real property tend to judge the value of an existing structure not only by considering the prices and rents of similar buildings, but also by comparing the cost to create a new building with optimal physical condition and functional utility. …
>
> To apply the cost approach, an appraiser estimates the market's perception of the difference between the property improvements being appraised and a newly constructed building with optimal utility (i.e. the ideal improvement identified in highest and best use analysis). In its classic form, the cost approach produces an opinion of value of the fee simple estate. [*Appraisal of Real Estate*, p 561-52.]

Menard's argument that the cost approach is a value-in-use theory is unsupported by any case law and is utterly incompatible with standard appraisal principles and practices.

Menard further alleges that the Court of Appeals opinion is not focused on market value, but is instead focused on value to the owner. *App Lv*, 18. But Menard's position ignores the fact that the sales comparison approach is *not* always the most reliable valuation method, depending on the selection of comparable sales and adjustments made. This Court has recognized that sales reflect many factors personal to the parties. *Antisdale*, 420 Mich at 278. Sales do not always reflect the "*usual* selling price." *Id.*

Indeed, throughout the last century, the sales comparison approach has been regularly rejected when sales data is determined to be speculative.[12] But ensuring that the comparable properties share the subject property's highest and best use reduces such speculation. It ensures that like properties are valued similarly by setting the same standard for selecting comparable properties that apply to the subject property. *The Appraisal of Real Estate, (14th ed) pp 42-44*). Stated differently, "[i]n order for a sale to be truly comparable to the property to be appraised, it must be competitive with the subject property."[13] McKim III, *Is Michigan's Ad Valorem Property Tax Becoming Obsolete?* 77 U Det. L R. 655, 673 (2000).

In sum, Menard's "value in use" argument fails because the cost-less-depreciation approach ***is*** a market approach and does not improperly value the property "in use." Because there is no merit to Menard's argument, the Application should be denied.

ii. The Court of Appeals did not improperly expand Clark.

Menard also argues that the Court of Appeals expanded *Clark Equipment Co v Leoni*, 113 Mich App 778; 318 NW2d 586 (1982), which Menard describes as "a discredited and narrowly applied decision, [which] effectively defined market value as a value-in-use concept for "big-box stores." *App Lv*, 1, 12. Menard either misunderstands or misconstrues *Clark*, which has not been "discredited" and which remains consistent with Michigan law.

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[12] *See, e.g., Cleveland-Cliffs*, 196 Mich at 189; *22 Charlotte, Inc v City of Detroit*, 294 Mich 275; 293 NW 647 (1940); *Fisher-New Ctr Co*, 380 Mich at 340; *Pantlind Hotel Co v State Tax Comm'n*, 3 Mich App 170; 141 NW2d 699 (1966).

[13] In finding that the Tribunal' selection comparable sales were not comparable to the subject property, this Court noted in *Edward Rose Bldg Co v Independence Twp*. that "Petitioner may not fairly argue that its property's value is comparable to other group-lot sales when petitioner specifically refuses to sell on that basis." *Edward Rose Bldg Co v Independence Twp*, 436 Mich at 639.

At the outset, *Clark* has not been overturned or questioned. The Application itself recognizes this fact in Footnote 8. While noting that *Clark* has been cited in *eighteen Michigan* cases and has been "favorably cited" in *Great Lakes Div of Nat'l Steel Corp v Ecorse,* 227 Mich App 379, 391; 576 NW2d 667 (1988), Menard is unable to provide any case "discrediting" *Clark* or overturning its statements of law. *Clark* remains good law.

Clark held that the cost approach is appropriate when there is a limited market of comparable sales and when using the suspect comparable sales would yield a speculative and inaccurate value. In *Clark*, the taxpayer argued that the use of the cost approach was *per se* valuing the property "in use." The taxpayer offered comparables that the Tribunal found not to be actually comparable, and thus the Tribunal used the cost approach. The *Clark* court reasoned in part as follows:

> When a large corporate entity such as Ford or General Motors builds a factory, it is probable that absolutely no market exists for the resale of that factory consistent with its current use. It is ludicrous to conclude, however, that such a brand new, modern, industrial facility is worth significantly less than represented by its replacement cost premised on value in use because, in actuality, such industrial facilities are rarely bought and sold. *Id.* at 785.

Notably, in *Clark*, the property's current use was its highest and best use – so, a "value in exchange" and "value in use" were equivalent. The market economics that produced the construction of a new building likewise supported the use of the cost approach to reach a market value. *Id*. at 785. The fact that few sales of the building existed did not mean the building was inherently obsolete if its current use was its highest and best use.

Clark is consistent with this Court's decision in *First Federal Savings & Loan Ass'n v Flint*, 415 Mich 702; 329 NW2d 755 (1982). In *First Federal*, the parties agreed that there were no comparable sales to use the sales approach. *First Federal* thus held that without comparable

sales, the cost approach could be used *if* expenditures that "merely enhance the 'image' or business of a property owner" were discounted from historical cost. *Id.* at 705. To ensure the cost approach was correctly applied, the case was remanded to the Tribunal – just as the Court of Appeals remanded this appeal. Nothing in *First Federal* discredits the holding in *Clark*, nor does *First Federal* mean that big box stores can only be valued using the sales comparison approach. Menard's faulty reading of *Clark* and *First Franklin* should be rejected.

c. The Court of Appeals correctly held that the cost-less-depreciation approach must be considered because there is an inadequate or distorted market.

This Court has long held that sales are only one indicator of true cash value and that other approaches to value may be necessary to eliminate the risk of speculative values. *Fisher-New Ctr Co*, 380 Mich at 361-363. The only other method of value presented to the Tribunal in this case was the cost approach.

"An accurate and detailed analysis of the highest and best use is critical to the cost approach." *Appraisal of Real Estate*, p 565. The property's highest and best use assists the determination of whether a replacement cost basis or reproduction cost basis should be used – that is, whether the current structure would be built as it exits. Highest and best use determines the "ideal improvement," from which to determine all forms of depreciation and obsolescence. *Appraisal of Real Estate*, p 570. Comparison of the existing improvement to an ideal improvement, which was also identified based on highest and best use, exposes the forms of depreciation. *Meadlowlanes*, 437 Mich at 503; *Detroit Lions*, 302 Mich at 698-99; *see also Appraisal of Real Estate*, p 565.

Menard opposes the use of the cost approach for big-box stores. As noted above, the Application erroneously suggests that the cost approach is not "market-based," (*App Lv* 1, 12, 16, 19), that the cost to construct the Menard store is a cost unique to Menard (*App Lv* 2, 12), and

that the cost approach is equivalent to Menard's self-defined concept of "value in use," (*App Lv* 3, 11,17, 19). Though it discusses the general forms of depreciation in the cost approach (which was one basis for the Court of Appeal's remand), the Application provides no discussion of the applicable highest and best use standard that would identify the forms and the amount of obsolescence. (*See App Lv* 13).

Contrary to Menard's position, the cost approach has value when buyers would build property similar to the subject, *Great Lakes*, 227 Mich App at 403, and has particular applicability to new construction and to construction that is economically viable but unique either because the market is limited or because the property is special purpose property. *Detroit Lions, Inc*, 302 Mich App at 699; *Thrifty Royal Oak v City of Royal Oak*, 130 Mich App 207; 344 NW2d 305 (1984); *see also, The Appraisal of Real Estate, (14th ed.*), "special purpose buildings," pp 269-270. As the *Appraisal of Real Estate* observes,

> [i]n any market, the value of a building can be related to its cost. **The cost approach is particularly important when a lack of market activity limits the usefulness of the sales comparison approach** and when the property to appraised … is not amenable to valuation by the income capitalization approach. Because cost and market value are usually more closely related when properties are new, the cost approach is important in estimating the market value of new or relatively new construction. The approach is especially persuasive when land value is well-supported and the improvements are new or suffer only minor depreciation and, therefore, approximate the ideal improvement that is the highest and best use of the land as though vacant. [*Appraisal of Real Estate*, p 566, emphasis added.]

In this case, the cost approach is particularly appropriate. The building on the property was new. The market for big box stores was restricted because of the industry-wide practice of imposing anti-competitive deed restrictions. Given the restricted market, using the standard construction cost as an indicator of value is user-neutral. The cost to construct similar buildings of equal utility has nothing to do with Menard specifically. Indeed, because the building was

unencumbered and the purported comparable properties were deed restricted, the cost approach was the only "pure" valuation method to value the fee simple interest.

d. The Court of Appeals correctly found a lack of record evidence supporting obsolescence.

In arguing against the cost approach, Menard insists that the property has "obsolescence" that prevents the use of this valuation method. The Court of Appeals rejected the Tribunal's and Menard's blanket unsupported conclusions (which Menard continues to argue in its Application – *see App Lv*, 14) that the subject property had significant obsolescence and noted that the standard to determine obsolescence was missing:

> **There was no evidence in the record** of any deficiency in the subject premises that would inhibit its ability to properly function as an owner-occupied freestanding retail building. The functional obsolescence to which Menard refers appears to be the fact that, due at least in part to self-imposed deed restrictions that prohibit competition, such freestanding retail buildings are rarely bought and sold on the market for use as such but are instead sold to and bought by secondary users who are required to invest substantially in the buildings to convert them into other uses, such as industrial use. However, as stated in *Clark*, to read MCL 211.27 "as requiring the taxing unit to prove an actual market for a property's existing use would lead to absurd undervaluations." *COA Op*, 11.

An accurate and detailed analysis of highest and best use is critical to the cost approach because the comparison of the existing improvements and the ideal improvement based on the highest and best use identifies any forms of depreciation that are present in the building. *The Appraisal of Real Estate*, p 565. The Tribunal did not use the property's highest and best use to determine the existence of obsolescence but instead erroneously compared the unencumbered, *owner occupied*, *free standing*, *retail building* used for "big box retail" to deed restricted, converted, non-commercial alternative uses.

The Court of Appeals properly found no evidence supporting the supposed "obsolescence" in the property. The Application likewise fails to identify ***any*** obsolescence and

provides no clue as to how obsolescence would be determined. These glaring omissions do not present any legal issues, let alone "legal principles of major significance of major significance to Michigan's jurisprudence." MCR 7.302(B)(3). The Application should be denied.

e. The Court of Appeals' decision is consistent with well-established case law from Michigan and other states.

Menard claims, incorrectly, that the Court of Appeals' decision evinces "blatant disregard for this Court's prior decisions [and] violates established legal principles . . ." *App Lv,* 19. Contrary to Menard's claim, the Court of Appeals' decision is firmly rooted in Michigan case law and is also consistent with the approach taken by courts across the country.

First, the Court of Appeals' decision affirms the holdings in two earlier published "big box" decisions: *Meijer, Inc v City of Midland*, 240 Mich App 1; 610 NW2d 242 (2000); and *Thrifty Royal Oak v City of Royal Oak*, 130 Mich App 207; 344 NW2d 305 (1984). In those cases, the Tribunal and the Court of Appeals rejected "comparable" sales of former big box properties, finding that the sales were distressed, that the market for big box stores was distorted, and that the cost-less-depreciation method should be used to value the existing property.

In *Meijer*, the Court of Appeals remanded the case for the Tribunal to make a determination of functional obsolescence. On remand, Meijer was unable to provide any market-supported evidence of the amount of functional obsolescence. See *Meijer, Inc v City of Midland (On Remand)*, 14 MTT 230 (Docket No. 190704), issued December 2, 2003; Exhibit 8 to Appellee-City of Escanaba's Court of Appeals Brief. Similarly, in *Thrifty Royal Oak*, the Court of Appeals affirmed the use of the cost approach to value a large, stand-alone, owner-occupied retail building because, as the Court of Appeals explained, "the lack of any reliable 'comparables' was by itself sufficient to demonstrate the unique character of the property and, in

turn, to justify resort to a cost approach to valuation." *Thrifty Royal Oak*, 130 Mich App at 231. The Court of Appeals found no obsolescence.

Consistent with *Thrifty Royal Oak* and *Meijer*, the Court of Appeals affirmed the potential applicability of the cost approach because of the limited or speculative real estate market for comparable property with the same highest and best use. Like the courts in the cases discussed above, the Court of Appeals remanded the matter for the Tribunal to receive additional evidence to evaluate the cost approach.

Other jurisdictions have reached similar results. In *Meijer Stores Limited Partnership v Franklin County Board of Revision*, 912 NE2d 560, 563 (2009), the Ohio Supreme Court affirmed the Ohio Board of Tax Appeals' (BTA) cost-less-depreciation value, which had concluded that no functional or external obsolescence existed for a newly-constructed Meijer store located in a growing retail corridor. The Ohio Supreme Court quoted a prior BTA decision rejecting similar obsolescence claims from Meijer: "the owner by purchasing the land and constructing the building, evidence a market need for such a property. Therefore, the cost of purchase and construction evidence that a prospective purchaser was willing at least to pay the costs of the property as newly constructed." *Meijer Stores*, 912 NE2d at 566 (quoting *Meijer, Inc v Montgomery Co Bd of Revision*, Ohio BTA (Docket Nos. 93-M-731, 732-33), issued February 8, 1995).

Similarly, the Wisconsin Court of Appeals affirmed its circuit court, which upheld the assessment of a Boston Store department store where the assessor—like in this case—used the cost approach and sales comparison approach. See *Bonstores Realty One, LLC v City of Wauwatosa*, 839 NW2d 893 (2013). The circuit court had rejected the taxpayer's comparable

sales, finding many of the properties were vacant and had "gone dark." *Id.* at 901.[14] It relied on the City's appraisal, which used both the cost approach and sales comparison approach. *Id.*

Like Michigan, other states have found the cost approach not only more reliable but also a method more capable of valuing "all interests," without regard to the identity of the taxpayer. For example, a Florida court, restating the Michigan Court of Appeals analysis in *Clark Equipment*, 113 Mich App at 785-86, stated:

> the cost approach is a logical appraisal method to apply to currently operating stores. As noted, the properties suffer little in the way of physical depreciation, functional obsolescence or external obsolescence. That, according to *The Appraisal of Real Estate*, 13th Edition, makes them a prime candidate for the cost approach:
>
> > The approach is especially persuasive when land value is well supported and the improvements are new or suffer only minor depreciation and, therefore, approximate the ideal improvement that is the highest and best use of the land as though vacant.
>
> *Id.* at 382. CVS' appraisal itself notes, 'This approach is most valid when analyzing new improvements which have not experienced any loss in value through normal wear and tear or other forms of depreciation. . . .'
>
> It is logical that, should a drug store chain decide what to pay for one of these properties, the drug store would look to the costs involved in building a new store on a competing corner. . . . CVS itself weighs the cost and benefits of building their own stores when it comes to the decision to acquire an existing store or chain of stores. . . . CVS expert . . . testified that cost would be a factor CVS would consider in determining what to pay for a store. Finally, the cost approach completely avoids one of CVS' primary concerns, the influence of the existing leas upon any sale of the property. [See *CVS Corp v Turner*, unpublished opinion of the Hillsborough County, Florida Circuit Court (Docket Nos. 07-008515, 08-010799, 09-020997, 10-009490), issued July 3, 2013.]

The Court of Appeals' decision is amply supported by Michigan case law and by decisions from other states that have confronted the "dark store" theory.

[14] The taxpayer's appraiser admitted that "a store 'going dark' may have a significant impact on the property." *Bonstores*, 839 NW2d at 901.

All of these cases lead to a reasonable conclusion: once a determination has been made that the highest and best use of the subject property is the continued use as a retail store, the logical measuring stick of valuation begins with the construction cost. That construction cost renders demolition or conversion for an alternative use financially unfeasible. *Appraisal of Real Estate*, pp 346-47. Indeed, it would be "ludicrous." *Clark*, 113 Mich App at 785.

Property that is unique in any respect requires "a great many considerations." *See Fisher-New Center Co*, 380 Mich at 361. As this Court recognized in *Fisher-New Center Co.*, with this kind of property "a slight variation" in determining the amount of obsolescence risks "considerable differences in valuation." *Id.* at 369. With the risk in view, the Court of Appeals properly held that evidence of the cost-less-depreciation approach should have been received and evaluated by the Tribunal. Accordingly, the Court of Appeals did not err in remanding this case, and the Application should be denied.

II. Leave to appeal should be denied because the Court of Appeals did not improperly "second guess" the Tribunal's weight and credibility determinations or "violate" the standard of review.

Menard claims that leave should be granted under MCR 7.305(B)(5)[15] (clearly erroneous and will cause material injustice) because the Court of Appeals "improperly made weight and credibility determinations reserved to the Tax Tribunal" and "violated the standard of review." Menard's arguments are without merit and do not warrant review by this Court.

a. The Court of Appeals must review the **whole** record, and not only the portions supporting the Tribunal's findings.

The scope of an appellate court's review of a decision of the Tax Tribunal is set forth in the Michigan Constitution:

[15] Menard cites to MCR 7.302(B)(5) but presumably means MCR 7.305(B)(5).

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28.]

An appellate court "review[s] whether the Tribunal 'made an error of law or adopted a wrong principle.'" *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 437; 830 NW2d 785 (2013), *quoting Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). The tribunal's factual findings are accorded deference only if they are supported by "competent, material, and substantial evidence on the whole record." *Briggs Tax Svc, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010). The Court of Appeals has held that "[e]vidence is competent, material, and substantial if a reasonable mind would accept it as sufficient to support a conclusion." *Galuszka v State Emps Ret Sys*, 265 Mich App 34, 45; 693 NW2d 403 (2004).[16]

Importantly, the appellate courts "review a final agency determination on the basis of the entire record, not just portions that support the agency's findings." *Stege v Dep't of Treasury*, 252 Mich App 183, 188; 651 NW2d 164 (2002). **The appellate court must consider "the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency."** *Romulus v Mich Dep't of Envtl Quality*, 260 Mich App 54, 84; 678 NW2d 444 (2003), quoting *Mich Emp Relations Comm v Detroit Symphony Orchestra, Inc*, 396 Mich 116, 124; 223 NW2d 283 (1974). Cursory rejection of evidence is erroneous, *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348; 483 NW2d 416 (1992), and factual findings must

[16] Competent, material, and substantial evidence has also been described as evidence that is "solid, true, reliable, authoritative, capable." *Goff v Bil-Mar Foods, Inc*, 454 Mich 507, 514 n 5; 563 NW2d 214 (1997), overruled on other grounds by *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000).

be explicit. *Oldenburg v Dryden Twp*, 198 Mich App 696, 700-01; 499 NW2d 416 (1993). Witness testimony must be based on evidence properly admitted on the record. *Consol Aluminum Corp v Richmond Twp*, 88 Mich App 229; 276 NW2d 566 (1979). If an appraiser is qualified as an expert and testifies, there must be a rational basis for his or her opinion. *Great Lakes Div of Nat'l Steel Corp*, 227 Mich App at 407.

In an assessment appeal such as this, the Petitioner has the burden of proof in establishing the true cash value of the property. MCL 205.737(3). The Tribunal's obligation to "independently determine value" means, as appellate courts have repeatedly found, that the Tribunal's role is pick the right value not to pick a winner. See *Forest Hills Corp v City of Ann Arbor*, 305 Mich App 572; 854 NW2d 172 (2014); *Pinelake Housing Coop v City of Ann Arbor*, 159 Mich App 208; 406 NW2d 832 (1987). An error of law may exist despite the parties having satisfied their burden of proof. *Jones & Laughlin*, 193 Mich App at 348.

b. The Court of Appeals did not improperly make weight and credibility determinations in addressing the Tribunal's errors of law.

As noted about, an appellate court "review[s] whether the Tribunal 'made an error of law or adopted a wrong principle.'" *Pontiac Country Club*, 299 Mich App at 437. The questions in this case – including the appropriate consideration of a particular valuation approach and whether the property was valued at its highest and best use – relate to the correct application of appraisal principles and are therefore legal issues.[17]

The Court of Appeals' determination that the Tribunal failed to apply standard appraisal practice when the Tribunal did not apply the standard of highest and best use to the two methods of

[17] See *Great Lakes Div. of Nat. Steel Corp*, 227 Mich App at 391 (adjustment of sales comparable); *Meijer*, 240 Mich App at 6 (calculation of obsolescence); *Antisdale*, 420 Mich at 278 (comparable sales adjusted by a flawed metholodolgy).

valuation was a determination that the Tribunal applied a wrong principle. The determination involved no factual resolution. As well, the Court of Appeals' determination that the Tribunal failed to determine the impact of the deed restrictions was a legal error, contravening several Michigan cases. The resulting misapplication of the sales comparison approach to a limited or nonexistence market and the rejection of the cost approach were also errors in which the Tribunal applied wrong principles in contravention of established Michigan precedent. These determinations did not involve weight or credibility matters, but rather involved the misapplication of Michigan law. Accordingly, the Court of Appeals did not improperly make weight or credibility decisions in addressing the Tribunal's errors of law.

c. The Court of Appeals did not improperly make weight and credibility determinations or exceed the permitted scope of appellate review in reviewing the record evidence.

Contrary to Menard's allegations in the Application, the Court of Appeals neither "substituted its judgment for that of the Tax Tribunal" nor "[made] its own weight and credibility determinations" concerning the testimony or documentary evidence. *App Lv*, 20. Rather, the Tribunal properly reviewed the evidence on the record as a whole and determined that there was not competent, material, or substantial evidence supporting the decision.

Menard complains that the Court of Appeals "failed to recognize" that the Tribunal found Menard's appraiser's testimony to be "meaningful." *App Lv*, 21. But the Court of Appeals is not bound to accept the Tribunal's mere characterization of the evidence as sufficient. If that were the standard, then the Court of Appeals' review would be meaningless, as the Tribunal presumably *always* characterizes the prevailing party's evidence as sufficient. Instead, the Court of Appeals is tasked with reviewing the **whole record** to decide whether the decision was supported by competent, material, and substantial evidence on the whole record. *See Romulus*, 260 Mich App at 84.

Upon reviewing the whole record, an appellate court can properly conclude that the decision was not supported by competent, material, and substantial evidence or that the Tribunal made an error of law. Some of Michigan's landmark property tax cases are illustrations of this appellate review. *See Antisdale*, 420 Mich at 268 (this Court reversed Tribunal upon finding that valuation approach was impermissible); *Edward Rose Bldg Co*, 436 Mich at 620 (Court of Appeals reversed Tribunal and this Court affirmed reversal, holding that the Tribunal adopted incorrect principles in measuring the true cash value of the property); *Meijer*, 240 Mich App at 1 (Court of Appeals reversed Tribunal's decision and remanded for redetermination where no evidence supported Tribunal's conclusion). Thus, the Court of Appeals in this case was required to – and did, properly – look at the evidence.

When it reviewed the whole record, the Court of Appeals found *no* evidence supporting the conclusion that the anti-competitive deed restrictions did not affect the comparable properties' sale prices. Menard's appraiser testified that the comparable properties "[may] have had deed restrictions in place but it wasn't anything that affected the sales price," but there was **no evidence** to support this. (*HT*, p 65.) The Court of Appeals explained as follows:

> [H]alf of the comparables in Torzewski's sales-comparison valuation contained deed restrictions that limited the use of the properties for retail purposes, thereby preventing sale of an entire fee simple interest in the property**. Torzewski failed to mention all the deed restrictions in his valuation report, did not make any adjustments for their existence, and, during his testimony, he insisted that the restrictions did not affect the value of the comparables because the parties involved in the comparable sales told him that the restrictions did not affect the sale price.**

COA Op, 15.

The Court of Appeals did not determine whether Torzewski's testimony was credible; the Court did not, for example, question whether Torzewski did in fact consult with the brokers,

sellers, and buyers of the comparables. Rather, the Court of Appeals found that ***even with*** that testimony, the Tribunal did not have competent, material, and substantial evidence to support a finding that the deed restrictions did not affect value:

> Although Torzewski testified that he considered the deed restrictions, **the record is insufficient to support his assertion that they had no effect on the sales price for the restricted comparables.** His testimony is that he consulted the brokers, sellers, and buyers of the comparables. **Thus, that testimony is only sufficient to establish that to the parties involved in the actual transaction, the deed restrictions did not affect the sales price they were willing to pay.** In other words, the market for sale was limited to those purchasers who were willing to accept the restrictions and so did not reflect the full value of the unrestricted fee simple.
>
> * * *
>
> **On this record, there is no evidence to account for the impact of the deed-restricted properties being sold for purposes other than the HBU of the subject property.** It is plain that no adjustments were taken for this major difference in the subject property and the restricted comparables. Accordingly, we conclude that the tribunal erred in finding Menard's sales-comparison approach meaningful to its determination of the subject property's TCV. *COA Op*, 8.

In other words, the only evidence before the Tribunal was Menard's appraiser's testimony that *the actual purchasers* of the comparable properties did not consider the deed restrictions to impact value. There was ***no evidence*** of how the deed restrictions impacted or deterred other prospective purchasers, who may have paid more for the properties but for the deed restrictions. That is why the Court of Appeals directed that, on remand, the Tribunal "take additional evidence with regard to the market effect of the deed restrictions." *COA Op*, 12.

The fact that the Tribunal characterized the testimony as "consistent", "persuasive", or "meaningful" does not mean that the conclusion was supported by competent, material, and substantial evidence on the whole record. *App Lv*, 28; *see Romulus, supra* (appellate court must

consider "the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency"). Menard has not identified any finding of the Court of Appeals that exceeded the appropriate standard of review, nor has Menard alleged any "material injustice." Accordingly, leave to appeal should be denied.

III. Leave to appeal should be denied because the Application does not raise questions that are significant to Michigan jurisprudence.

Menard alleges that the Court of Appeals decision will have "sweeping implications on future assessments of 'big box stores' and other commercial and industrial properties in Michigan" and a "devastating impact on the assessment of both commercial and industrial properties" in Michigan. *App Lv*, 2, 18. Menard's "sky is falling" rhetoric is not well-founded and does not create grounds for granting leave to appeal.

a. The Court of Appeals' decision was fact-driven, and the ultimate conclusion of this case will rest on additional factual findings at the Tribunal.

For all of the "devastating impact" that Menard predicts, the Court of Appeals' decision is notable for what it did *not* do. The decision did *not* determine a value of the subject property. The decision did *not* hold that the cost-less-depreciation approach must be used in this case. The decision did *not* toss the sales comparison approach. And the decision did *not* redefine "market value." Instead, consistent with the standard of review, the Court of Appeals concluded that the Tribunal's decision was unsupported by the record and was based on a legal error, so the Tribunal remanded the case for the taking of additional evidence, which must then be used to inform the Tribunal's independent determination of the property's true cash value. *COA Op*, 12.

In that regard, Menard's statements in its Application are demonstrably false. Menard asserts that the Court of Appeals "essentially adopted a blanket cost valuation methodology" and that big box store properties "can no longer be assessed based on comparable sales . . ." *App Lv*,

17. Of course, that was not the Court of Appeals' decision at all, and the hyperbolic exaggeration in the Application should not go unnoticed by this Court.

This is a fact-driven case, and with the remand, the taking of additional evidence is necessary. The Tribunal will make additional findings of fact and issue a new decision, which may or may not be favorable to Menard and which likely will prompt additional appeals. But at this juncture, before any of the additional evidence is received, review by this Court would be premature and improvident. The Tribunal's remand proceedings must first be completed. The City submits that the Application should be denied on that basis.

b. The Court of Appeals' decision is limited to big-box retail stores.

Menard claims that the Court of Appeals' decision will have wide implication for all commercial and industrial property. *App Lv*. 3, 10, 18-19. But the main issue in this appeal – the impact of anti-competitive deed restrictions on the market value of purportedly comparable properties – is unique to big-box retailers. There was no testimony regarding industrial properties, any use of deed restrictions by industrial owners, or anti-competitive practices that are designed to prevent the sale of industrial property to industrial purchasers. Any speculation about what deed restrictions might exist in other industries is just that – mere speculation.

Moreover, Menard's theory at the Tribunal was that big-box retail stores should only be valued using the sales comparison method, and its valuation approach was premised on big box retailers' anticompetitive business practices. Menard's special valuation method of exclusively using distressed sales drove its valuation summary, its testimony, and the questions on cross-examination. Thus, all of the testimony and evidence at the hearing focused on big-box retail stores – not industrial or other commercial properties. The Application' argument that the case will impact other types of property is unfounded.

c. The Court of Appeals' decision is consistent with the new "dark stores" legislation, which is expected to be in enacted in before the end of 2016.

Finally, this Court should deny leave to appeal because the "dark store" valuation theory central to this case will soon be addressed by the Michigan Legislature.

The Court of Appeals' decision details numerous failures with Tribunal's findings of fact, including the Tribunal's failure to identify evidence (*COA Op 7, 12*), failure to consider evidence *(COA Op 8, 10, 11),* failure to reach specific findings of fact *(COA Op 6-7, 12),* and failure to follow standard appraisal methodologies required under Michigan law *(COA Op 8, 10, 11).* The Court of Appeals emphasized that the Tribunal "made an error of law by failing to value the subject property at its [highest and best use]." (*COA Op 8.*) The Court of Appeals' decision is as much an indictment of the Tribunal's *process* for deciding big-box appeals as it is of the Tribunal's errors in this particular case.

In that respect, the Court of Appeals' decision is nearly a narrative of a recent bill in the Michigan Legislature, House Bill 5578 (adding section 38 to the Tax Tribunal Act, MCL 205. 701, *et. seq.*, hereinafter referenced as "Sec. 38"). House Bill 5578 passed the House on June 8, 2016 by a vote of 97 to 11, and is expected to be considered by the Senate when its session begins this fall. **(Exhibit C.)** House Bill 5578 is designed to guide the Tribunal in big-box appeals to reduce the kinds of legal errors that occurred in this case. The content of the bill is derived from the standard appraisal treatise, *The Appraisal of Real Estate.*

House Bill 5578 requires the Tribunal to "separately state its findings of fact and conclusions of law as to all" of the standard appraisal processes in the sequence. (Sec. 38(1).) Those findings and conclusion begin with the determination of the market (Sec. 38(1)(A)), a determination of each of the four elements of the highest and best use analysis (Sec. 38(1)(B)), and the consideration and use of all three methods of valuation (Sec. 38(C), (F)). The Tribunal is

required to make its determination in accordance with the generally accepted appraisal principles. (Sec. 38(2)(D)).

Relevant in this appeal, House Bill 5578 requires the Tribunal to explicitly work through each aspect of the four-part "highest and best use" test, including a determination of the cost to covert or remodel property when otherwise comparable property is sold for a different use. (Sec. 38(1)(B)(iii)). The Tribunal would be required to state a determination of highest and best use and apply that determination of highest and best use to each valuation approach. (Sec. 38(C), (D)(ii). The bill addresses in detail vacancy and deed restrictions as they might apply to the selection of comparable sales and impact a highest and best use determination. (Sec. 38(1)(D) (iv), (v)).

The bill does not prohibit either vacant comparable sales or comparable sales with deed restrictions ***if*** they reflect typical exposure to and sales in the market under the same economic conditions as the subject property. (Sec. 38(1)(D)(iv), (v)). That is, consistent with the Court of Appeals' decision in this case, the Tribunal must receive evidence and engage in analysis before relying on vacant and deed-restricted comparables. Nothing in House Bill 5578 is inconsistent with long-standing Michigan law or the historic definition of "true cash value" in MCL 211.27. Indeed, House Bill 5578 is not an amendment to MCL 211.27's definition of "true cash value" but rather a detailed expression of that definition.

The Court of Appeals' decision foreshadows the effect of House Bill 5578. Given that the Court of Appeals' instructions on remand are consistent with the pending legislation – which likely will be enacted before this Court could render a decision – this Court should deny leave to appeal and allow the Tribunal to engage in additional fact finding on remand.

CONCLUSION

For these reasons, the City of Escanaba requests that this Court deny the Application for Leave to Appeal.

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